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James P. West

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COMMENTS

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Introduction

Currency conversion is the process whereby foreign currency is expressed in its equivalent United States dollar amount.¹ Currency is converted by multiplying the amount of the currency of the exporter's home market by the exchange rate that exists between the dollar and that foreign currency.² Currency conversion thus allows for the comparison of the United States price³ of exported merchandise with the exporter's home market price⁴ of the same merchandise. A comparison is necessary for determining whether a product is being dumped. Dumping is the sale or likely sale of a class or kind of foreign merchandise in the United States at less than its fair value that causes or threatens material injury to or materially retards the development of a domestic industry.⁵

Consequently, currency conversion is a vital component of antidumping determinations. Currency conversion that fails to reflect accurately the real price of goods in the home market of an exporter can result in either the penalization of innocent exporters or the failure to sanction exporters who are actually dumping merchandise. Unfortunately, floating exchange rates have greatly complicated currency conversion in the context of dumping determinations, and relevant regulations have not yet adequately responded to such complications.

This Comment explores the historical development of the statutory and regulatory scheme for currency conversion in the context of antidumping investigations. Specifically, this Comment focuses upon the adaptations of the antidumping currency conversion provi-

¹ 31 U.S.C. § 5151(b) (1988).

² See generally 19 C.F.R. § 353.60 (1990). For example, assuming the exchange rate is \$3/DM, a good that costs 1DM in Germany would cost \$3 in the United States because 1DM x \$3/DM = \$3.

³ See generally 19 C.F.R. § 353.41 (1990). "'United States price' means the purchase price or the exporter's sales price of the merchandise In calculating the United States price, the Secretary will use sales or, in the absence of sales, likely sales." *Id.* § 353.41(a).

⁴ See generally 19 C.F.R. § 353.46 (1990).

⁵ See 19 U.S.C. § 1673 (1988).

sions to a floating, rather than fixed, foreign exchange environment and judicial treatment of the regulatory adaptations.⁶ Four recent cases, *Melamine Chemicals, Inc. v. United States*,⁷ *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*,⁸ *Industrial Quimica del Nalon, S.A. v. United States*,⁹ and *NTN Bearing Corp. of America v. United States*¹⁰ are scrutinized in order to shed light upon the courts' thoughts.

Additionally, this Comment proffers an alternative interpretation of the present antidumping currency conversion provisions, based on agency comments regarding proposed currency conversion regulations, that provides greater uniformity to currency conversion. Finally, this Comment suggests a new, coherent currency conversion methodology that better protects domestic industry and ensures fairness to foreign exporters.¹¹

The rational application of exchange rates in the conversion of currency results in the most accurate determination of dumping margins¹² possible under the current antidumping provisions. An accurate calculation of dumping margins ensures that those domestic industries in need of protection from dumping will be protected, and that those foreign exporters who are not dumping will not be unfairly penalized.¹³ In addition, minimizing exchange rate distortions that stem from inadequate regulatory provisions should assist in effectuating domestic economic policy with regard to the consumption of imported goods.¹⁴

⁶ For a lucid explanation of the economic significance of fixed and floating exchange rate environments, see R. LIPSEY, P. STEINER & D. PURVIS, *ECONOMICS* 803-35 (7th ed. 1984) [hereinafter LIPSEY]. See also *infra* notes 89-98 and accompanying text.

⁷ 732 F.2d 924 (Fed. Cir. 1984).

⁸ 640 F. Supp. 255 (Ct. Int'l Trade), *appeal after remand*, 645 F. Supp. 956 (Ct. Int'l Trade 1986).

⁹ 729 F. Supp. 103 (Ct. Int'l Trade 1989).

¹⁰ 747 F. Supp. 726 (Ct. Int'l Trade 1990).

¹¹ See *Melamine Chemicals*, 732 F.2d at 933.

¹² Dumping margin is "the amount by which the foreign market value exceeds the United States price of the merchandise." 19 C.F.R. § 353.2(f)(1) (1990).

¹³ A change in the exchange rate between the dollar and the currency of the exporter changes the price of the exported good in the American market. UNITED STATES INT'L TRADE COMM'N, *FLOATING EXCHANGE RATES AND U.S. COMPETITIVENESS* 54 (1982). A decline in the value of the dollar, relative to the exporter's currency, requires a commensurate rise in the U.S. price of the exported good in order to avoid a positive antidumping determination. See *Industrial Quimica*, 729 F. Supp. at 109. If an inappropriate exchange rate is chosen, either the exporter will be penalized despite the propriety of its response because the price increase will appear insufficient, or the domestic industry in need of protection from dumping will fail to receive adequate protection because an insufficient price increase will appear to be appropriate. See *infra* note 125 for an illustration.

¹⁴ A floating exchange rate, in theory, automatically (via market forces) adjusts itself to correct persistent trade imbalances between nations. LIPSEY, *supra* note 6, at 827. By removing the distortion between the exchange rate recognized by the law in antidumping investigations and the exchange rate produced by the currency markets, judicial and administrative decisions should assist in promoting quicker corrections in persistent trade imbalances. It should be noted that, for the sake of simplification, this Comment deals

A Brief History of the Rates and Regulations

Included in the Antidumping Act of 1921¹⁵ was a two-tiered provision for the conversion of currency.¹⁶ The Antidumping Act's currency conversion rule provided for a governmentally proclaimed quarterly rate based upon the pure metal value of the foreign coinage.¹⁷ Either a variance of the proclaimed rate from the Federal Reserve Board (FRB) certified daily rate of more than five percent or the absence of a governmentally proclaimed rate resulted in the use of the FRB's certified daily rate for currency conversion.¹⁸ The FRB's daily rate was "the buying rate for cable transfers, payable in the foreign currency so to be converted [in the New York market on the day of exportation]."¹⁹ This currency conversion scheme was wholly adequate to accommodate the foreign exchange conditions that prevailed in the 1920s.

Although exchange rates were theoretically floating during the early 1920s, the period during which the Antidumping Act was passed, most nations refused to permit currency devaluation in fear of the loss of national prestige.²⁰ The exchange rates of the period

only with the effect of trade imbalances upon currency values. Currency values are in fact additionally affected by capital flows, government grants, the use of official currency reserves, and inflation. *Id.* at 808-16.

¹⁵ Antidumping Act of 1921, ch. 14, tit. II, 42 Stat. 9 (1921) [hereinafter Antidumping Act of 1921] (*repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144, 193 (1979) (codified at 19 U.S.C. §§ 2501, 2504 (1988))). The conversion of currency section of the Antidumping Act of 1921 provided as follows:

(a) [T]he value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the first day of January, April, July, and October of each year.

(b) [W]herever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary . . . for the quarter in which the merchandise was exported.

(c) If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal Reserve Bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through the exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange.

Antidumping Act of 1921, *supra*, 42 Stat. 9, 17.

¹⁶ *See id.*

¹⁷ *Id.* A quarterly rate is determined four times per year or once every three months.

¹⁸ *Id.*

¹⁹ *Id.* § 403(c).

²⁰ UNITED STATES INT'L TRADE COMM'N, *supra* note 13, at 11.

were established by currency values primarily based on a gold standard that existed prior to World War I.²¹ Consequently, the Antidumping Act's currency conversion provisions reflected both a pure metal-based system of currency valuation to reflect gold-based currency values and a market-based system of valuation in order to provide sufficient flexibility in the event of a rare devaluation.²²

As the financial chaos that marked the Great Depression and World War II began to dissipate, a fixed exchange rate system known as the Bretton Woods system was devised.²³ The Bretton Woods system pegged, or fixed, foreign currency values to the U.S. dollar, which was convertible into gold.²⁴ Nations were required to limit exchange rate fluctuations to one percent above or below par value.²⁵ In consultation with the International Monetary Fund, nations were permitted to realign exchange rates only when unable to overcome persistent trade deficits.²⁶

During the Bretton Woods tenure, the Customs Simplification Act of 1956 was enacted, adding a third tier to the antidumping currency conversion provision.²⁷ The third tier allowed for the conversion of foreign currency "at a value measured by the buying rate first certified . . . for a day in the quarter in which the day of exportation falls."²⁸ According to the legislative history of the Customs Simplifi-

²¹ *Id.*; LIPSEY, *supra* note 6, at 948-49.

²² Section 403 of the Antidumping Act of 1921 expressly incorporates and amends section 25 of the Act of August 27, 1894, ch. 349, § 25, 28 Stat. 509, 552 (1894). *See* Antidumping Act of 1921, *supra* note 15, § 403(a), (b), 42 Stat. 9, 17. In 1894, the U.S. dollar was on the gold standard. UNITED STATES INT'L TRADE COMM'N, *supra* note 13, at 10.

²³ *See generally* UNITED STATES INT'L TRADE COMM'N, *supra* note 13, at 12-13; LIPSEY, *supra* note 6, at 949.

²⁴ LIPSEY, *supra* note 6, at 822, 949-50.

²⁵ *Id.* at 950; UNITED STATES INT'L TRADE COMM'N, *supra* note 13, at 13.

²⁶ LIPSEY, *supra* note 6, at 822.

²⁷ Customs Simplification Act of 1956, Pub. L. No. 84-927, 70 Stat. 943. It should be noted that the Customs Simplification Act was designed to amend, among other things, the currency conversion provision of the Tariff Act of 1930, rather than the currency conversion provision of the Antidumping Act of 1921. *Id.* Interestingly, the currency conversion provisions of both aforementioned acts had been singly codified as section 372 of Title 31. *See* 31 U.S.C. § 372 (1976). Consequently, amending the currency conversion provision of the Tariff Act of 1930 similarly affected the currency conversion provision of the Antidumping Act of 1921. Any potential interpretative discrepancies inherent in 31 U.S.C. § 372 as it related to the Antidumping Act of 1921 were rendered moot as of January 1, 1980, when the Antidumping Act of 1921 was effectively repealed, and the antidumping laws were amended onto the Tariff Act of 1930. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified at 19 U.S.C. §§ 2501-2582 (1988)).

²⁸ As amended by the Customs Simplification Act of 1956, the currency conversion statute reads as follows:

If no value has been proclaimed . . . for the quarter in which the merchandise was exported, or if the value so proclaimed varies by five per centum or more from a value measured by the buying rate at noon on the day of exportation, then conversion of the foreign currency involved shall be made—

(A) at a value measured by such buying rate, or

(B) if the Secretary of the Treasury shall by regulation so prescribe with respect to the particular foreign currency, at a value measured by the buying

cation Act, the third tier, which provided "authority to continue use of the same rate of exchange for each currency for a three-month period," was a "time-saving change."²⁹

The third tier provided an alternative to the application of the daily buying rate.³⁰ Like the daily buying rate, the third tier was only applicable in the event that either the government failed to proclaim a conversion rate or the proclaimed rate varied by five percent or more from the daily buying rate.³¹ The third tier was, however, inapplicable during periods in which the daily buying rate on the date of exportation varied by five percent or more from the third tier rate itself.³² This simplification of the currency conversion methodology was justifiable given the essentially fixed conversion values of foreign currencies.³³

The Bretton Woods system collapsed on August 15, 1971, when President Nixon took the United States dollar off of the gold standard and permitted exchange rates to float for over three months.³⁴ In December of 1971, the United States entered into the Smithsonian Agreement in order to reestablish a fixed rate system.³⁵ By March of 1973, however, the Smithsonian Agreement had completely collapsed.³⁶ Despite early expectations to the contrary, floating exchange rates have prevailed since the disintegration of the Smithsonian Agreement.³⁷ A primary reason for the adoption of floating exchange rates was the desire to facilitate a correction in the United States' persistent balance of trade deficits.³⁸

rate first certified under this subsection for a day in the quarter in which the day of exportation falls (but only if the buying rate at noon on the day of exportation does not vary by five per centum or more from such first-certified buying rate).

Customs Simplification Act of 1956, *supra* note 27, § 3, 70 Stat. 943, 946.

²⁹ S. REP. NO. 2560, 84th Cong., 2nd Sess. 4-5 (1956), *reprinted in* 1956 U.S. CODE CONG. & ADMIN. NEWS 4179, 4182.

³⁰ *Id.*

³¹ Customs Simplification Act of 1956, *supra* note 27, § 3(c)(1), 70 Stat. 943, 946.

³² *Id.* § 3(c)(1)(B).

³³ LIPSEY, *supra* note 6, at 949.

³⁴ UNITED STATES INT'L TRADE COMM'N, *supra* note 13, at 18.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 17. LIPSEY, *supra* note 6, at 953. With floating exchange rates, the value of the dollar should decline relative to the value of the foreign currency of a nation with which the United States is running a trade deficit because the American demand for the foreign nation's currency that is needed to buy goods imported into the United States is greater than the foreign nation's demand for the U.S. currency (dollars) needed to buy goods exported from the United States. *Id.* at 808-09. As the demand for the dollar falls relative to the demand for the foreign currency, so will the value of the dollar fall relative to the value of the foreign currency. *Id.* at 809. As the value of the dollar declines in relative terms, more dollars are required in order to purchase imported goods. *Id.* Stated more simply, the weaker the dollar is, the more expensive imported goods are. As the cost of any good rises, the demand for that good will decrease (assuming price elasticity greater than zero). *Id.* at 63, 93. The decline in the demand for more expensive imported goods automatically (via market forces commonly referred to as the "invisible hand") rectifies the

The Antidumping Act's scheme for foreign currency conversion was not significantly altered for over fifty years.³⁹ The principal characteristics of the Bretton Woods system, fixed exchange rates and infrequent rate realignments, produced little need for adjustment of the currency conversion provisions. In 1975, however, the United States Customs Service of the Department of the Treasury (Customs) published a notice of proposed rulemaking in order to solicit comment on potential antidumping regulation changes, including the addition of a special rule for currency conversion.⁴⁰

As originally proposed, the special rule provided that "if a significant currency realignment occurred which affected the prices under consideration, no price discrepancies resulting solely from such currency realignment will be taken into account in fair value investigations with respect to relevant transactions taking place within 45 days of such realignment."⁴¹ The adjustment time was apparently provided in order to allow exporters sufficient time to adjust to new exchange rates.

Less than one year later, Customs revised the proposed special rule for currency conversion in order to better reflect an international monetary system characterized by flexible, rather than fixed rates.⁴² The revision read as follows:

For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations.⁴³

The substance of the special rule has not significantly changed in the

trade deficit. *Id.* at 827. With fixed exchange rates, trade deficits could be remedied only by realigning exchange rates (i.e., lowering the value of the currency of the nation with a trade deficit relative to the value of the currency of the nation with a trade surplus) under the supervision of the International Monetary Fund. *Id.* at 822. In light of the fact that, under the Bretton Woods system, all foreign currency values were set relative to the dollar, a change in the value of the dollar would accomplish nothing in the way of resolving a trade deficit because foreign currencies would automatically undergo a commensurate value adjustment relative to the dollar. *Id.* at 952.

³⁹ See Antidumping, 37 Fed. Reg. 26,298, 26,306 (1972) (codified at 19 C.F.R. § 153.52(b) (1978) (repealed in 1980)).

⁴⁰ Antidumping and Petitions by American Manufacturers, Producers & Wholesalers, 40 Fed. Reg. 30,825 (1975) (notice of proposed rulemaking). Institution of the regulatory changes was required in order to conform with the mandates of the Trade Act of 1974, which amended the Antidumping Act of 1921. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. §§ 2101-2487 (1988)).

⁴¹ 40 Fed. Reg. at 30,836.

⁴² Antidumping and Petitions by American Manufacturers, Producers & Wholesalers, 41 Fed. Reg. 26,203, 26,204 (1976).

⁴³ *Id.* at 26,214 (codified at 19 C.F.R. § 153.52(b) (1978) (repealed in 1980)).

fifteen years since this revision was proposed.⁴⁴

The Courts and Currency Conversion: Applying the Special Rule

Melamine Chemicals, Inc. v. United States,⁴⁵ decided in 1984, was the first authoritative interpretation of the special currency conversion rule. *Melamine Chemicals* involved an investigation of an American chemical manufacturer's allegation of dumping by a melamine exporter located in the Netherlands.⁴⁶ The agency responsible for conducting the antidumping investigation, the Department of Commerce International Trade Administration (ITA), concluded that melamine was not being dumped.⁴⁷

The ITA based its determination upon its interpretation of the then-existing special rule for currency conversion, 19 C.F.R. section 353.56(b).⁴⁸ The special rule was invoked due to the existence of rapidly fluctuating exchange rates that persisted throughout the period of investigation.⁴⁹ The ITA ruled that, due to the particular facts of the case, the conversion of currency with the preceding quarter's FRB certified exchange rate was appropriate.⁵⁰

The United States Court of International Trade (CIT) overturned the ITA ruling, in part, because the CIT believed that the application of the exchange rates from the preceding quarter, which is referred to as the ninety-day lag rule, was arbitrary and capricious.⁵¹ The CIT rationale for holding the ninety-day lag rule arbi-

⁴⁴ See 19 C.F.R. § 353.60(b) (1990).

⁴⁵ 732 F.2d 924 (Fed. Cir. 1984).

⁴⁶ *Id.* at 925.

⁴⁷ Melamine in Crystal Form from the Netherlands, 45 Fed. Reg. 29,619, 29,619 (1980) (amended final determination).

⁴⁸ *Id.* at 29,620. The rule of 19 C.F.R. § 353.56(b) had been adopted in its entirety from the customs regulation at 19 C.F.R. § 153.52(b) despite criticism from commentators. Antidumping Duties, 45 Fed. Reg. 8,182, 8,190 (1980). Had the ITA refused to apply 19 C.F.R. § 353.56(b), dutiable dumping margins greater than two percent would have been produced. *Melamine*, 45 Fed. Reg. at 29,620.

⁴⁹ *Melamine*, 45 Fed. Reg. at 29,620. "The dollar dropped steadily during the month of October 1978, rebounded sharply . . . in late October . . . and then declined again in December." *Melamine Chemicals*, 732 F.2d at 932. "During the first quarter of 1979 the West German mark jumped 6 percent in value against the U.S. dollar, and then dropped 3.4 percent during the second quarter of 1979." *Id.* at 933. At the time, 19 C.F.R. § 353.56(b) read as follows:

(b) Special rules for fair value investigations. For purposes of fair value investigations, producers, resellers, and importers will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations.

19 C.F.R. § 353.56(b) (1988) (superseded in 1989).

⁵⁰ *Melamine*, 45 Fed. Reg. at 29,620.

⁵¹ *Melamine Chemicals, Inc. v. United States*, 561 F. Supp. 458 (Ct. Int'l Trade 1983), *rev'd*, 732 F.2d 924 (Fed. Cir. 1984).

trary was that the rule actually permitted an exporter to wait up to 180 days before rectifying its pricing practices.⁵²

Although the court failed to explain how the ninety-day lag rule actually allowed exporters to wait up to 180 days before adjusting price, it can be surmised that, because the exchange rate applicable to each quarter is derived from the first daily buying rate prevailing in the quarter, the one quarter lag allows a minimum of ninety days for price adjustment. By waiting until the last day of the quarter in which dumping is investigated, the exporter may wait an additional ninety days before adjusting price, thus allowing a total of 180 days, one-half year.

In rebuking the CIT analysis of the *Melamine Chemicals* case, the United States Court of Appeals for the Federal Circuit held that the application of the preceding quarter's exchange rate was neither unreasonable nor arbitrary.⁵³ According to the court, "an exporter pricing his goods during one quarter could not anticipate the effect of volatile exchange rate fluctuations occurring within that quarter."⁵⁴ In addition, the court revealed that "neither the CIT nor Melamine has asserted . . . that the margin was . . . due to any cause other than volatile exchange rate fluctuations."⁵⁵

The court consequently determined that application of the ninety-day lag rule was reasonable.⁵⁶ The authority for the application of the lag rule was derived by the court from the duty of the ITA to enforce antidumping laws fairly.⁵⁷ Fair enforcement, according to the court, entails discounting or disregarding margins resulting solely from factors that are beyond the control of the exporter.⁵⁸

Two years later, in *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*,⁵⁹ the CIT selectively relied on the opinion in *Melamine Chemicals* to develop its own interpretation of the special rule.⁶⁰ The period of investigation in the *Luciano Pisoni* case was marked not by rapid exchange rate fluctuations but a steady appreciation of the dollar against the respondent's home market currency, the Italian lira.⁶¹ According to the CIT, the ITA's finding of dumping margins was unreasonable because the entire margin resulted from the use of quarterly exchange rates.⁶²

⁵² *Melamine Chemicals*, 561 F. Supp. at 464.

⁵³ *Melamine Chemicals*, 732 F.2d at 928-32.

⁵⁴ *Id.* at 933.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 640 F. Supp. 255 (Ct. Int'l Trade 1986).

⁶⁰ *Id.* at 260-61. The special rule analyzed by the CIT was 19 C.F.R. § 353.56(b).

⁶¹ *Id.* at 260.

⁶² *Id.* at 260-61.

The CIT believed that the purpose of antidumping law would be violated if Commerce found a dumping margin based on the use of quarterly rates but would find no margin using the rates prevailing at the time of transactions, regardless of the presence of exchange rate fluctuations.⁶³ The CIT neglected to state definitively whether the basis of its decision was an interpretation of the special rule. It is nonetheless apparent that the CIT was applying the special rule because the decline in the value of the lira was less than five percent.⁶⁴

The issue of currency conversion was again addressed by the CIT in *Industrial Quimica del Nalon, S.A. v. United States*,⁶⁵ which, like *Luciano Pisoni*, dealt with nonvolatile but significant exchange rate changes. The ITA, in a review proceeding, had refused to apply the most recent version of the special rule⁶⁶ because the ITA believed

⁶³ *Id.*

⁶⁴ The general rule for currency conversion only allows the court to apply daily rates when the daily rate at the time of the transaction varies by more than five percent from the certified quarterly rate (assuming a certified quarterly rate exists, as was the case in *Luciano Pisoni*, 640 F. Supp. at 260). The variance of the daily rate of the foreign currency from its certified quarterly rate, in this case, was less than five percent. Palmeter, *Exchange Rates and Antidumping Determinations*, J. WORLD TRADE, Apr. 1988, at 73, 78. The general rule reads as follows:

(a) Rule for conversion. The Secretary will convert, under section 522 of the Act (31 U.S.C. 5151(c)), a foreign currency into the equivalent amount of United States currency at the rates in effect on the dates described in section 353.46, section 353.49, or section 353.50, as appropriate.

19 C.F.R. § 353.60(a) (1990). See 31 U.S.C. § 5151 (1988), which provides, in relevant part, as follows:

(c) Except as provided in this section, conversion of currency of a foreign country into United States currency . . . shall be made at values published by the Secretary under subsection (b) of this section for the quarter in which the merchandise is exported.

(d) If the Secretary has not published a value for the quarter in which the merchandise is exported, or if the value published by the Secretary varies by at least 5 percent from a value measured by the buying rate at noon on the day the merchandise is exported, the conversion of the currency of the foreign country shall be made at a value—

(1) equal to the buying rate at noon on the day the merchandise is exported; or

(2) prescribed by regulation of the Secretary for the currency that is equal to the first buying rate certified for that currency by the Federal Reserve Bank of New York under subsection (e) of this section in the quarter in which the merchandise is exported, but only if the buying rate at noon on the day the merchandise is exported varies less than 5 percent from the buying rate first certified.

Id.

⁶⁵ *Industrial Quimica del Nalon, S.A. v. United States*, 729 F. Supp. 103 (Ct. Int'l Trade 1989).

⁶⁶ 19 C.F.R. § 353.60(b) (1990), which reads as follows:

Special rules for investigations. For purposes of investigations, producers, resellers, and importers will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. When the price of the merchandise is affected by temporary exchange rate fluctuations, the Secretary will not take into account in fair value comparisons any difference between United States price and foreign market value resulting solely from such exchange rate fluctuation.

that the special rule was only applicable in fair value investigations, not review proceedings.⁶⁷ Consequently, the ITA determined that the respondent had been dumping potassium permanganate.⁶⁸

The CIT overruled the decision, holding that economic rationality and the basic purpose of the Trade Agreements Act require that some adjustment be made for exchange rate changes that were solely responsible for the margins calculated in either fair value investigations or administrative reviews.⁶⁹ In dictum, the CIT addressed the ITA's limited application of the present special rule to investigations involving only temporary currency fluctuations, stating that:

[t]he Court is aware that confusion concerning a proper interpretation of the "circumstances" contemplated by the special rule has engendered an inconsistent application of § 353.60(b) A plain reading would seem to compel a conclusion opposite [to that of the ITA]. The Secretary is directed to discount "temporary exchange rate fluctuations" which create a difference between the United States' price and foreign market value, that difference resulting solely from such exchange rate fluctuation. Therefore, only during a period of "sustained changes" in currency rates would a special treatment be warranted to allow producers a "reasonable" amount of time to account for the altered exchange rate in their pricing practices.⁷⁰

The logic of the *Industrial Quimica* dictum was reflected in the CIT's recent decision in *NTN Bearing Corp. of America v. United States*.⁷¹ During the period of investigation by the Department of Commerce, "the yen experienced a forty percent increase in value against the dollar."⁷² The forty percent decrease in the dollar's value, however, occurred over a one year period and was characterized by the court as a steady decline.⁷³ The CIT affirmed the ITA's holding that the special rule was not applicable to the facts of the case because the CIT believed that application of the special rule was appropriate in only two situations, this not being one of the two.⁷⁴

One appropriate situation was the occurrence of drastic shifts in the exchange rate over a short period of time.⁷⁵ The other situation deemed appropriate for application of the special rule was the occur-

Id.

⁶⁷ *Industrial Quimica*, 729 F. Supp. at 109-10.

⁶⁸ Potassium Permanganate from Spain, 53 Fed. Reg. 21,504, 21,506 (1988) (final affirmative determination).

⁶⁹ *Industrial Quimica*, 729 F. Supp. at 111-12 (citing *Melamine Chemicals v. United States*, 732 F.2d 924, 934 (Fed. Cir. 1984) (emphasis deleted)).

⁷⁰ *Id.* at 113 (citing Rosenthal, 408 PRACTICING L. INST. COMM. 9 (1987)).

⁷¹ 747 F. Supp. 726 (Ct. Int'l Trade 1990). Note that the decision refers to importers rather than exporters. This is because it is the domestic importers of the foreign goods who are subject to import duties levied by the United States government.

⁷² *Id.* at 733.

⁷³ *Id.* at 734.

⁷⁴ *Id.* at 734-35.

⁷⁵ *Id.* at 733-34 (citing *Melamine Chemicals v. United States*, 732 F.2d 924, 928 (Fed. Cir. 1984)).

rence of a steady rise or fall in the exchange rates, but only when "the record shows the . . . diligent attempt to adjust price in accordance to the currency shifts."⁷⁶ The latter situation was deemed appropriate in recognition of the fact that "[w]here the currency doesn't fluctuate but instead steadily rises or falls, the importer has [the] ability to respond to changes, albeit always being a step behind."⁷⁷ Both situations assume that dumping margins result solely from exchange rate shifts.⁷⁸

The special rule was ultimately held inapplicable because, according to the record, NTN "failed to act for six months and when it finally did act, did so insufficiently."⁷⁹ Although the special rule was deemed inapplicable, the CIT's analysis in *NTN Bearing Corp.* comports with the "plain reading" rather than "limited" interpretation of the special rule.

Reinterpreting the Special Rule

As revealed by the *Industrial Quimica* decision, a dichotomy in the court's interpretation of the special rule has developed. One interpretation, based on a "plain reading" of the rule as described in the *Industrial Quimica* opinion, provides a reasonable amount of time for "producers" to respond to sustained changes in exchange rates by adjusting pricing practices.⁸⁰ The "plain reading" interpretation additionally provides that dumping margins resulting solely from temporary exchange rate fluctuations be discounted.⁸¹ This interpretation of the special rule allows greater flexibility in dealing with exchange rate movements than does the "limited" interpretation of the rule.

The "limited" interpretation of the rule triggers invocation only when exchange rates are rapidly fluctuating and volatile.⁸² The *Industrial Quimica* court noted the "limited" interpretation of the rule directs that "[f]or sustained changes in currency exchange rates, prudent business people adjust their prices accordingly, thus dispensing with any use of the special rule under those circumstances."⁸³

A careful analysis of the special rule's development, however, reveals that both the "limited" and "plain reading" interpretations of the special rule may be misconceived. Instead, an historical interpretation, developed by this Comment, may more accurately reflect

⁷⁶ *Id.* at 734 (citing generally Luciano Pisoni *Fabbrica Accessori Instrumenti Musicali v. United States*, 640 F. Supp. 255 (Ct. Int'l Trade 1986)).

⁷⁷ *Id.*

⁷⁸ *Id.* at 733.

⁷⁹ *Id.* at 734-35.

⁸⁰ *Industrial Quimica*, 729 F. Supp. at 113.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

the intent of the special rule. The special rule may in fact be designed to provide a respondent⁸⁴ with a forty-five day period in which to adjust price in reaction to a sustained change in exchange rates.

In addition, the plain language of the special rule permits an extension of the forty-five day period in the event of exchange rate fluctuations that occur prior to the advent of the forty-five day period. In other words, the special rule allows a respondent more than forty-five days to react to exchange rate changes if the days immediately following an exchange rate adjustment are characterized by exchange rate fluctuations.⁸⁵

As originally proposed in 1975, the "Special Rule for Fair Value Investigations," then denoted 19 C.F.R. section 153.52(b),⁸⁶ read, in part, "if a significant currency realignment occurred which affected prices under consideration, no price discrepancies resulting solely from such currency realignment will be taken into account . . . with respect to relevant transactions taking place within 45 days of such realignment."⁸⁷

The proposed regulation provided respondents with a grace period in which to deal with price adjustment.⁸⁸ The grace period was an improvement to the general rule for currency conversion,⁸⁹ under

⁸⁴ A respondent is herein defined as a producer, reseller, or importer investigated for alleged dumping. See 19 C.F.R. § 353.60(b) (1990).

⁸⁵ For purposes of developing the "historical" interpretation of the special rule, the definitions of the following terms are adopted:

realignment: the act of adjusting semipermanently again; to bring into proper relative position again. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 53, 1890 (1976).

trend: to show an inherent tendency or general drift; incline. *Id.* at 2438.

fluctuation: a wavering or unsteadiness; vacillation. *Id.* at 876.

⁸⁶ Antidumping and Petitions by American Manufacturers, Producers and Wholesalers, 40 Fed. Reg. 30,825, 30,836 (1975).

⁸⁷ 40 Fed. Reg. at 30,836. It is interesting to note that respondent under the general rule has zero to ninety days, depending upon the date of sale, to adjust price to a newly proclaimed or certified quarterly rate (which is published on the first day of each quarter). Assuming sales are distributed evenly over the quarter, a respondent will have less than forty-five days to react to the new rate for half of its sales and more than forty-five days to react for the remaining half of its sale. On average, a respondent would have forty-five days to adjust price. Perhaps this logic explains the origin of the otherwise seemingly arbitrary forty-five day period.

⁸⁸ *Id.*

⁸⁹ Under a fixed exchange rate system, the antidumping currency conversion provision, 19 C.F.R. § 153.52 (1972), read as follows:

Conversion of currencies. In determining the existence and amount of any difference between the purchase price or exporter's sales price and the foreign market value (or, in the absence of such value, the constructed value) for the purposes of sections 153.2 through 153.5 of these regulations or of section 201(b) or 202(a) of the Antidumping Act, 1921, as amended (19 U.S.C. §§ 160(b), 161(a)), any necessary conversion of a foreign currency into its equivalent in U.S. currency shall be made in accordance with the provisions of section 522, Tariff Act of 1930, as amended (31 U.S.C. § 372) and section 16.4 of this chapter: (a) as of the date of purchase or agreement to purchase, if the purchase price is an element of the comparison; or (b) as of

which respondents had been forced to conform their prices to each newly certified rate. The general rule was particularly oppressive in the event that a certified daily exchange rate was used to establish price due to a significant movement of the exchange rate from the rate certified for the quarter on the date of export.⁹⁰

The fixed exchange rate system under which respondents formerly operated typically provided a stable currency value from which price could be determined.⁹¹ With a fixed exchange rate system, significant change in an exchange rate occurred under controlled circumstances only to correct persistent international trade imbalances.⁹² As a result, significant changes in an exchange rate could often be anticipated by respondents.⁹³ Requiring respondents to adjust price to the exchange rate prevailing on the date of sale or certified at the start of a new quarter therefore presented only minimal hardship because the exchange rate realignment was generally expected, and realignment usually had some degree of permanence.⁹⁴

A floating exchange rate system, on the other hand, failed to provide stable currency conversion rates. Exchange rate movements often occurred without warning, lasted for indefinite periods, and were of unpredictable magnitudes.⁹⁵ Under a floating exchange rate system, fluctuations only lasting a single day could occur.⁹⁶ Additionally, as floating rates perpetually moved, pushed by the "invisible hand," toward continually changing equilibrium market values, exchange rate trends were constantly developing.⁹⁷ Clearly, in a floating exchange rate system, it was extremely difficult, if not impossible, to react quickly or predict accurately the direction and magnitude of any exchange rate movement.⁹⁸ Consequently, setting prices in order to prevent dumping margins was extremely difficult, if not impossible.

The application of the daily exchange rate prevailing on the date of sale, as required by the general rule for currency conversion provisions when the variance between daily and quarterly rates is greater than five percent, would potentially force respondents to attempt to adjust price on the date that the sales contract was to be executed.

the date of exportation, if the exporter's sales price is an element of comparison.

37 Fed. Reg. 26,306 (1972).

⁹⁰ See *id.*

⁹¹ LIPSEY, *supra* note 6, at 822.

⁹² *Id.* at 826, 950-51.

⁹³ *Id.* at 951.

⁹⁴ *Id.* at 826, 951.

⁹⁵ *Id.* at 828.

⁹⁶ *Melamine Chemicals, Inc. v. United States*, 732 F.2d 924, 932 (Fed. Cir. 1984).

⁹⁷ LIPSEY, *supra* note 6, at 828.

⁹⁸ See UNITED STATES INT'L TRADE COMM'N, *supra* note 13, at 44.

Demanding such rapid price adjustment would obviously result in the disintegration of countless contractual negotiations.

Contracts that could be executed despite the required price adjustment would unfortunately incorporate all exchange rate fluctuations into the contract price. Incorporating the exchange rate into the price of respondent's goods would potentially disrupt domestic markets due to the resulting price instability.⁹⁹ In order to accommodate both the needs of respondents and domestic markets, a special currency conversion rule, section 153.52(b), providing a forty-five day grace period, was proposed in 1975.¹⁰⁰

Of course, the problem resulting from the specification of a finite period, such as forty-five days, was that, with floating exchange rates, rate movement can be merely temporary. When an exchange rate movement first occurs, a fluctuation cannot be distinguished from a realignment.¹⁰¹ Without the ability to accurately predict the path of a rate movement, a respondent must, nevertheless, determine whether a price adjustment in response to the rate movement is necessary within forty-five days.

In other words, the special rule, as originally proposed, permitted a respondent up to forty-five days to react to an exchange rate realignment by adjusting the price of the exported goods. When exchange rates fluctuated for an extended period, however, the respondent was faced with a quandary because the trend around which the rate fluctuated might not have been immediately apparent to a respondent. By the time a trend was discernible, the respondent was left with significantly fewer than forty-five days to react to the exchange rate change which "began" on the first day that the rate fluctuation occurred.

Consequently, eleven months after publication of the first proposed special rule, Customs released a revision.¹⁰² The comment accompanying the revision read, in part, that the special rule:

has been changed to reflect the current international monetary system which is characterized by flexible, rather than fixed currency exchange rates. The revised paragraph will provide that . . . [where] the facts justify it, a longer term basis for measuring changes in exchange rates may be utilized in making price comparisons. Less than fair value sales should therefore not occur in such cases as a result of brief exchange rate fluctuations.¹⁰³

The revision comment reveals that the intent of the revision was

⁹⁹ *Melamine Chemicals*, 732 F.2d at 932.

¹⁰⁰ Antidumping and Petitions by American Manufacturers, Producers & Wholesalers, 40 Fed. Reg. 30,825, 30,836 (1975) (notice of proposed rulemaking).

¹⁰¹ For definitions of the terms "fluctuation" and "realignment," see *supra* note 85.

¹⁰² Antidumping and Petitions by American Manufacturers, Producers & Wholesalers, 41 Fed. Reg. 26,203 (1976). For the text of the revised rule, see *supra* text accompanying note 43.

¹⁰³ 41 Fed. Reg. at 26,204.

to provide a respondent with a forty-five day grace period to adjust price in order to account for a sustained exchange rate change. In the presence of fluctuating rates, however, the revision comment reveals that the intent of the revision was to allow the ITA to extend the forty-five day period, which begins to run when the exchange rate first moves regardless of whether the movement ultimately reveals itself to be either a fluctuation or a realignment, as long as reasonably necessary in order to avoid the finding of a dumping margin solely due to the fluctuations. The distinction between this "historical" interpretation and the "limited" and "plain reading" interpretations discussed above is important.

The "limited" interpretation of the special rule permits the application of a reasonable period only to discount the effects of temporary fluctuations.¹⁰⁴ No grace period is provided for price adjustment in response to sustained rate changes. Instead, the respondent must adjust price in accordance with a certified quarterly or daily rate, as specified in the general conversion rule.¹⁰⁵ The "historical" interpretation, in contrast, provides a forty-five day grace period to adjust price to sustained change while dealing with temporary fluctuations in substantially the same manner as the "limited" interpretation.¹⁰⁶

One justification proffered for the limited approach is that: to interpret the special rule, section (b), as applicable to moderate and progressive currency value changes would render section (a), the general rule, of the currency conversion regulation meaningless since no currency conversion would ever be made at the normal times called for in that section, unless there had been absolutely no change from quarter to quarter. This is not the intent of the regulation [19 C.F.R. § 353.60(b)].¹⁰⁷

A similar argument concerning regulatory conflict was addressed in *Melamine Chemicals*.¹⁰⁸ In that case, the court dismissed the notion of a conflict between the general and special rules, noting that nothing forbids or prohibits the promulgation of a special rule such as subsection (b).¹⁰⁹ According to the court, the general rule need not "control all conversions . . . in all phases of all antidumping proceedings."¹¹⁰

Similar logic dictates that the fact that the application of the special rule renders the general rule meaningless is but a truism.¹¹¹

¹⁰⁴ *Industrial Quimica*, 729 F. Supp. at 113.

¹⁰⁵ *Id.*

¹⁰⁶ See *supra* text accompanying note 101.

¹⁰⁷ Erasable Programmable Read Only Memories (EPROMs) from Japan, 51 Fed. Reg. 39,680, 39,684-85 (1986) (final affirmative determination). For the text of the general rule, see *supra* note 64. For the text of the special rule, see *supra* note 66.

¹⁰⁸ 732 F.2d at 928-30.

¹⁰⁹ *Id.* at 930.

¹¹⁰ *Id.*

¹¹¹ Theoretically, subsection (a) of the currency conversion provision has value be-

Contrary to the unsupported justification proffered in support of the "limited" interpretation, it appears that the very intent of the special rule is to entirely displace the general rule in the absence of constant exchange rates because the general rule was designed to deal only with the constant rates of a fixed exchange rate system. In fact, it seems quite perverse to ignore the plain language of the regulation and the purpose of the regulation as evidenced by its accompanying comment. Furthermore, it is unreasonable to adhere to this interpretation given the reality of the respondent's situation in attempting to deal with unpredictable exchange rates merely to preserve the potency and use of a regulation designed more than fifty years ago to accommodate a vastly different type of exchange rate system.¹¹²

Additional support for the "limited" interpretation stems from the concern that permitting respondents to benefit from the ninety-day lag rule in an environment of steady change creates a potential for abuse.¹¹³ This concern hardly amounts to a substantive criticism of the "reasonable period" allowance for steady change. As the ITA emphasized in the *Melamine* determination, "the appropriate approach will vary from case to case, depending upon the particular facts of the case."¹¹⁴ Obviously, if the ninety-day lag rule would permit abuse by a respondent in a particular case, the ITA possesses the discretionary authority to shorten the lag, which would nevertheless be a "reasonable period" based upon the facts of the case.

Although the "plain reading" interpretation of the special rule does not succumb to the weaknesses inherent in the limited interpretation, it too possesses shortcomings and differs substantially from the "historical" interpretation. According to the "plain reading" interpretation, a reasonable amount of time may be provided to a respondent to account, in pricing goods that are exported to the United States, only for a sustained exchange rate movement.¹¹⁵ Dumping margins resulting solely from temporary fluctuations are

cause, even with a floating exchange rate system, rates may remain substantially constant throughout one quarter or more. Furthermore, it is interesting to note by way of analogy that the Internal Revenue Code retained its special capital gains provisions even when taxpayers paid the same marginal rate for both capital gains and ordinary income. The apparent justification for retaining the special provisions was the likelihood of the reinstitution of distinct capital gains rates. Similarly, several politicians and economists have supported a return to a fixed exchange rate system, most notably former Congressman Jack Kemp, now Secretary of Housing and Urban Development, whose 1988 Presidential platform during the Republican primaries included a return to the gold standard.

¹¹² Antidumping Act of 1921, *supra* note 15.

¹¹³ "An exporter could wait until the last day of the period before adjusting prices, and even then the exporter could also lag the adjustment by one quarter." (In reference to the ability of respondents to lag price adjustments by 180 days, as pointed out by the CIT in *Melamine Chemicals*.) *Industrial Quimica*, 729 F. Supp. at 113.

¹¹⁴ *Melamine in Crystal Form from the Netherlands*, 45 Fed. Reg. 29,619, 29,620 (1980) (amended final determination).

¹¹⁵ *Industrial Quimica*, 729 F. Supp. at 113.

simply discounted.¹¹⁶ In contrast, the "historical" interpretation restricts the ITA's discretion by permitting only a forty-five day, rather than reasonable, grace period to adjust prices and reveals a specific methodology for discounting the effects of temporary fluctuations.¹¹⁷

The Federal Circuit's decision in *Melamine Chemicals* failed to alleviate any of the confusion surrounding the interpretation of the special rule.¹¹⁸ In fact, after determining that the promulgation of the special rule was a reasonable exercise of discretionary authority, the court did little more than recite the language of the ITA's determination, pronounce its support for the determination, and defer to the agency's expertise for the purposes of future determinations.¹¹⁹

The language used by the court indicates that an exchange rate accommodation, specifically the ninety-day lag rule, was most likely permitted due to the prevalence of temporary fluctuations. To wit, the court "[a]fforded the [respondent] a reasonable period of time to adjust its prices to volatile and temporary fluctuations in the exchange rate."¹²⁰ The court's application of preceding quarter rates provides no indication of the interpretation of the special rule, if any, to which the court subscribed because all three interpretations permit significant flexibility in addressing problems caused by temporary fluctuations.

The *Melamine* court did, however, engage in an analysis of the comment that accompanied the 1976 special rule revision.¹²¹ According to the court, the comment demonstrated that "the concept of disregarding margins created artificially and solely by exchange rate fluctuations ('currency realignments') was developed immediately after the need arose."¹²² The court's belief that fluctuations and realignments were one and the same may form the basis of the "limited" special rule interpretation, which provides a grace period for price adjustment only in an atmosphere of fluctuating rates. Nevertheless, the CIT's decision in the *NTN Bearing Corp.* case confirms that the CIT has adopted a contrary "plain reading" interpretation.¹²³

Rethinking the Currency Conversion Methodology

One problem common to all existing interpretations of the spe-

¹¹⁶ *Id.*

¹¹⁷ See *supra* text accompanying note 101.

¹¹⁸ See *Melamine Chemicals*, 732 F.2d at 931-34.

¹¹⁹ See *id.*

¹²⁰ *Id.* at 933. See *supra* notes 54-55 and accompanying text.

¹²¹ *Melamine Chemicals*, 732 F.2d at 931.

¹²² *Id.*

¹²³ See *NTN Bearing Corp. of America v. United States*, 747 F. Supp. 726 (Ct. Int'l Trade 1990).

cial rule is that each has empowered the courts with a hindsight unavailable to respondents. When an exchange rate movement first occurs, a respondent cannot know or predict whether the movement constitutes a temporary fluctuation or a sustained change.¹²⁴ Should the exchange rate movement fail to subside immediately, a respondent must determine whether price adjustment is needed in order to reflect the rate change. An incorrect guess will injure either the respondent and the consumers of the respondent's goods or domestic industries in competition with the respondent.¹²⁵ Of course, by the time the ITA indulges in an antidumping investigation, the path of exchange rate movement is known and the ITA can apply alternative rates should the court determine that it would have been unreasonable to demand a price adjustment in response to the rate movement.

The facts in the *Melamine Chemicals* case supply an excellent illustration of the hindsight problem.¹²⁶ According to the court, "the dollar dropped steadily during the month of October 1978 [and] rebounded sharply . . . in late October."¹²⁷ In mid-October, a reasonable respondent would most likely have begun to adjust price in response to the steady change in exchange rate that persisted for two to three weeks. The "plain reading" and "historical" interpretations would have required the respondent to adjust price for any transaction contemplated forty-five or a reasonably greater number of days after the exchange rate shift occurred. The "limited" interpretation would have demanded an immediate price adjustment so that sales contracts executed in October, as well as November, reflected the steady rate change. Consequently, a price adjustment in mid-October would have been the typical and reasonable response of a respondent negotiating sales contracts to be executed in October and November.

In late October, however, the path of the exchange rate movement was abruptly and significantly altered. Under such circumstances, all three special interpretations generally would have treated the October rate movements in toto as a fluctuation and applied ex-

¹²⁴ "Rates may fluctuate substantially day to day, and still be characterized as 'trending' upwards or downwards and characterized as part of a longer 'steady' shift in exchange rates. Rates may also 'steadily' move in one direction, only to reverse that trend by the end of the dumping investigation or review period." *Industrial Quimica*, 729 F. Supp. at 114.

¹²⁵ For example, if the U.S. dollar steadily weakens relative to the respondent's currency, it will appear to the respondent that an upward price adjustment is necessary in order to avoid the imposition of antidumping duties. Should the decline in the dollar value prove to be an aberration, the respondent's price adjustment will have forced consumers to pay higher prices, thereby diminishing the demand for respondent's goods and potentially contributing to domestic inflation. Conversely, if an aberrational dollar strengthening occurs, the respondent can lower price, which generally increases respondent's sales and diminishes the market share of domestic competitors.

¹²⁶ *Melamine Chemicals*, 732 F.2d at 932.

¹²⁷ *Id.*

change rates existing prior to the October decline for any November transactions, despite the fact that all three special rule interpretations would probably have forced a reasonable respondent to have changed or begun to change price by mid-October.¹²⁸ Furthermore, due to the exchange rate rebound in late October, a respondent that had neglected to respond to the steady rate change in October probably would not have been penalized for its failure to raise price as required.¹²⁹

In order to put a respondent on equal footing with the courts by restricting the ITA's ability to use a hindsight unavailable to respondents, it is imperative that the currency conversion regulations detail specific expectations of price adjustment in response to exchange rate changes. In other words, the agency can and must restrain through regulation the use of hindsight by providing respondents with a price adjustment methodology. The methodology must, at a minimum, specify the amount of time permitted to adjust prices and the exchange rate upon which price adjustment must be based. Ideally, the exchange rate utilized for the currency conversion should reflect any significant trend or realignment while minimizing the impact of volatile, temporary fluctuations.

Clearly, the application of the FRB certified quarterly rate fails to capture relevant rate movements that occur within one quarter. In addition, the application of daily rates builds rate fluctuations into price, thereby disrupting markets. An exchange rate that would best reflect trends and simultaneously minimize fluctuations would seem to be some sort of moving average exchange rate.¹³⁰ For example, the methodology could specify a forty-five day period to be used as a basis for determining the applicable exchange rate. On each successive day, both respondents and courts could look back over the past forty-five days and derive an exchange rate based upon the rate movements within that period.

By applying the exchange rate of the forty-fifth day as derived from the exchange rates trend of the previous forty-five days, a respondent is forced to alter price to reflect primarily the period's trends and realignments and only minimally the temporary fluctua-

¹²⁸ In *Melamine Chemicals*, the court applied an exchange rate calculated on the basis of currency transactions in June in order to convert sales in November. *Id.* at 933.

¹²⁹ See *id.* at 924; *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 640 F. Supp. 255 (Ct. Int'l Trade 1986).

¹³⁰ Although numerous statistical techniques exist for determining a single rate based on rate movements over the course of forty-five days, one simple method is the use of a linear estimate or trend equation determined with least squares. See L. OTT & D. HILDEBRAND, *STATISTICAL THINKING FOR MANAGERS* 574-76 (1983). The least-squares method calculates the slope and intercept of a line representing the relationship of the independent variable, time, to the dependent variable, the exchange rate. *Id.* at 55. The least-squares method is a type of regression analysis that minimizes the total squared prediction error. *Id.*

tions.¹³¹ Once the appropriate rate is determined, a respondent could be required to adjust price to the new rate within a specified period such as forty-five days, as contemplated by the original version of the special rule.

This "forecast" rule would both allow respondents to discover the actual rate that the ITA would utilize in its antidumping determinations and demand that respondents react to changes in the rate within a reasonable period of time. The result of the "forecast" rule is to reflect in the price of goods imported into the United States at the end of any quarter the changes in an exchange rate occurring in the first half of that quarter. Either the basis or reaction periods of the rule can be altered in order to comport with the demands of domestic economic policy. For example, studies may reveal that a basis of sixty days and a reaction requirement of thirty days may result in more preferable economic effects.¹³²

The shortcomings of the existing regulatory currency conversion scheme were recognized by the CIT in *Luciano Pisoni*.¹³³ Consequently, the CIT abandoned the regulatory scheme utilized by the Department of Commerce and created its own currency conversion guidelines apparently based on the court's desire for normative fairness and reasonableness.¹³⁴ The result of the court's freelancing was to utilize certified daily rates, an alternative not contemplated by any acknowledged interpretation of the special rule, to solve a "problem" clearly within the scope of the special rule, specifically, an exchange rate trend constituting a change of less than five percent.¹³⁵

Two problems with the result of the court's freelancing are immediately evident. First, as discussed earlier, the use of daily rates builds into the price exchange rate fluctuations that are disruptive to domestic markets.¹³⁶ Second, and more importantly, with an exchange rate change such as the trend evident in *Luciano Pisoni*, reasonable respondents would typically both desire and require a reasonable period of time to adjust price. In *Luciano Pisoni*, however,

¹³¹ The rate as calculated by the linear equation will typically be different than the market rate of day forty-five since it is based upon something akin to an average of rates during the previous forty-five days.

¹³² See *Toho Titanium Co., Ltd. v. United States*, 743 F. Supp. 888 (Ct. Int'l Trade 1990) (supporting the international trade policy reflected in antidumping law rather than acceding to long-term contractual obligations that would otherwise frustrate timely correction of the trade imbalance).

¹³³ 640 F. Supp. at 260-61.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ "When exchange rates are fluctuating substantially, a given dollar price of a product in the United States could change technically from fair to 'unfair' literally from day to day, even if the foreign price of a product, denominated in the foreign currency, also remained constant." Melamine in Crystal Form from the Netherlands, 45 Fed. Reg. 29,619, 29,620 (1980) (amended final determination).

the respondent not only did not demand time to react to the exchange rate change but did not react at all to the change.¹³⁷

The reason for this seeming anomaly was that *Luciano Pisoni* involved an unusual antidumping investigatory situation in which the dollar was appreciating relative to the respondent's currency.¹³⁸ By applying daily rates, the court allowed the respondent to maximize its benefit from the appreciation of the dollar. That the court should confer this benefit upon the respondent without the respondent undertaking any price adjustment to justify its exceptional treatment seems incomprehensible.¹³⁹ In more recent determinations, both the CIT and the ITA have required respondents to demonstrate that they acted within a reasonable period of time to adjust prices in response to a change in exchange rates in order to justify application of the special rule.¹⁴⁰

Conclusion

With the exception of the *Industrial Quimica* and *NTN Bearing Corp.* decisions, the judicial interpretation and application of the special currency conversion rule has been, to date, quite confused. Little attention is paid to the reality of the exchange rate situation faced by respondents and, as evidenced by the *Luciano Pisoni* decision, often little attention is paid to the special rule itself. As a result, the application of exchange rates under the special rule has not been uniform. Taken as a whole, the decisions to date have revealed either that the existing regulatory provisions for currency conversion or the current interpretations of those provisions that are relied upon by the courts simply are inadequate.

Although the "historical" interpretation developed in this Comment may have merit, it shares the applicational problems inherent in the "plain reading" and "limited" interpretations of the special rule. In order to institute a currency conversion methodology, such as the "forecast" rule outlined above, that is fair to all concerned parties, regulatory change is imperative. By providing respondents with a methodology to ascertain accurately the exchange rate by

¹³⁷ *Luciano Pisoni*, 640 F. Supp. at 260.

¹³⁸ "A declining dollar generates dumping margins, especially if the decline is too swift to permit reasonable price adjustments. Conversely, when the dollar rises, it tends to erase dumping margins." Dickey, *Antidumping: Currency Fluctuations as a Cause of Dumping Margins*, 7 INT'L TRADE L.J. 67, 67 (1982). A steadily increasing value of the dollar is probably the primary reason for a lull in antidumping activity. *Id.* at 70.

¹³⁹ *NTN Bearing Corp.* suggests that *Luciano Pisoni* no longer represents good law because the *NTN Bearing Corp.* decision requires the respondent to "diligent[ly] attempt to adjust price in accordance to the currency shifts" in order to benefit from the special rule. *NTN Bearing Corp.*, 747 F. Supp. at 734.

¹⁴⁰ See, e.g., *id.*; Malleable Cast Iron Pipe Fittings from Japan, 52 Fed. Reg. 13,855 (1987) (final affirmative determination).

which dumping margins will be calculated, international trade will be facilitated.

The special rule has changed little since it was first introduced in 1976, but the Department of Commerce is apparently aware of the rule's inherent shortcomings. In 1980, the Department of Commerce noted that:

[s]ome comments criticized the impact which the current method of currency conversion may have on the determination of whether sales at less than fair value exist. Although consideration of these comments is continuing, effective administration of the law requires that the preexisting practice continue until a determination can be made as to whether a change in practice is appropriate.¹⁴¹

In the eleven years since that comment was released, criticism of the special rule has continued, but, to date, there has been no substantive change.¹⁴² Clearly, the flaws inherent in the present special rule mandate a new approach to currency conversion provisions in order to satisfy the purpose of antidumping law.

JAMES P. WEST

¹⁴¹ Antidumping Duties, 45 Fed. Reg. 8,182, 8,190 (1980).

¹⁴² See, e.g., Palmeter, *supra* note 64, at 77-80.